Supreme Court, U. S.
FILED
NOV 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-531

UNION CAMP CORPORATION, *Petitioner*

v.

SEABOARD COAST LINE RAILROAD COMPANY, RAY D. BROWN AND NANCY JANE BROWN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

ARNOLD C. YOUNG
MALCOLM R. MACLEAN
F. SAUNDERS ALDRIDGE, III
Post Office Box 9848
Savannah, Georgia 31402

Attorneys for Respondent Seaboard Coast Line Railroad Company

Of Counsel:

HUNTER, HOULIHAN, MACLEAN, EXLEY, DUNN & CONNERAT, P. C.
Post Office Box 9848
Savannah, Georgia 31402

JAMES E. WILLIAMS
500 Water Street
Jacksonville, Florida 32202

November, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENIAL OF WRIT	
1. The Decision Below Correctly Applies Georgia Law To The Contract Between The Parties	5
2. The Decision Below Is Unaffected By *Sammons* v. *Union Camp*	8
3. Georgia Law Does Not Require Reference To "Indemnitee's Negligence"	9
4. The Grammatical Construction Offered By Union Camp Omits Material Terms of the Contract	10
5. Recovery Over Against An Indemnitor Is Not At Issue	11
6. *United States* v. *Seckinger* Does Not Involve Georgia Law	11
7. The Relevant Provisions Were Construed In Context	12
8. The Decision Below Does Not Require or Justify Exercise By This Court Of Its Discretionary Powers of Review	13
CONCLUSION	15
APPENDIX	
District Court Order and Opinion of August 6, 1975	1a
District Court Order and Opinion of September 10, 1975	6a

CASES: Page

Batson-Cook Company v. *Georgia Marble Setting Company*, 112 Ga. App. 226, 144 S.E.2d 547 (1965) ... 9
Cole v. *Chevron Chemical Company*, 477 F.2d 361 (5th Cir.) *cert. denied* 414 U.S. 978 (1973) 10
Georgia Ports Authority v. *Central of Georgia Railway*, 135 Ga. App. 859, 219 S.E.2d 467 (1975) ... 10
King v. *United Commercial Travelers*, 333 U.S. 153 (1948) 8
Louisville and Nashville Railroad v. *Atlantic Company*, 66 Ga. App. 791, 19 S.E.2d 364 (1942) 7, 14
Rite Diet Feeds v. *Central of Georgia Railway*, 136 Ga. App. 14, 16, 220 S.E.2d 22, 24 (1975) 11
Robert and Company Associates v. *Pinkerton and Laws Company*, 120 Ga. App. 29, 169 S.E.2d 360 (1969) 4, 10, 11
Sammons v. *Union Camp*, Superior Court of Chatham County, Georgia 5, 8, 13
Southern Railway v. *Brunswick Pulp and Paper Company*, 376 F. Supp. 96 (S.D. Ga. 1974) 12
United States v. *Seckinger*, 397 U.S. 203 (1970) 12
U.S.A., Inc. v. *Kirkland*, 142 Ga. App. 484, 233 S.E.2d 833 (May 9, 1977) 11

STATUTES AND RULES:

Georgia Code § 20-702 ..... 2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-531

UNION CAMP CORPORATION, *Petitioner*

v.

SEABOARD COAST LINE RAILROAD COMPANY, RAY D. BROWN AND NANCY JANE BROWN, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the United State Court of Appeals for the Fifth Circuit is reported at 554 F.2d 1299 and is reproduced in Petitioner's Appendix (Pet. App. 2a-18a). The August 6, 1975, Order and opinion of the United States District Court for the Southern District of Georgia and the September 10, 1975, Order and opinion of the District Court are unreported and omitted from Petitioner's Appendix. The District Court Orders and opinions appear as an Appendix to this brief (Resp. App. 1a-8a).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1a) was entered June 27, 1977. A Petition for Rehearing *en banc* was denied (Pet. App. 19a) on August 25, 1977. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals fail to follow the law of Georgia in its affirmance of the trial court that the contract in litigation provides indemnity to Respondent Seaboard Coast Line Railroad Company?

2. Is the decision below one which requires or justifies exercise by this Court of its discretionary review powers?

STATUTE INVOLVED

Georgia Code Section

> 20-702 (4266) Intention of parties must be sought—The cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction.

STATEMENT OF THE CASE

Petitioner Union Camp Corporation [Union Camp] seeks review of a Court of Appeals decision which affirms the District Court holding that Respondent Seaboard Coast Line Railroad Company [SCL] is entitled to full contractual indemnity for costs and expenses incurred in successfully defending the main action brought by Respondents Ray and Nancy Brown.

Union Camp and SCL were each found to be contributorily negligent with respect to a collision between a tractor-trailer driven by Brown and an SCL locomotive at a private crossing owned and maintained by Union Camp. The jury found that the negligence of the plaintiff exceeded that of either defendant and thus, under Georgia Law, the resulting judgment discharged both SCL and Union Camp. The Browns have not appeared in subsequent proceedings.

By agreement, SCL's cross-claim for contractual indemnity was tried by the Court after return of the jury in the main case. The cross claim is founded on paragraph 5 (providing indemnity for crossing accidents)[1] and paragraph 12 (providing indemnity where Union Camp caused or contributed to any accident on its property)[2] of a road switching agreement which fixes the rights and liabilities of Union Camp and several rail-

---

[1] Paragraph five provides in pertinent part:

> . . . Union Camp, at all times, to protect, hold harmless and indemnify [SCL] . . . against any and all loss, cost, damage and expense accruing account of any road crossing at grade with tracks of Union Camp.

(Pet. App. 23a).

[2] The undertaking in paragraph twelve of the Joint Switching Agreement states in pertinent part:

> In the operation, use . . . or maintenance of the tracks . . . Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, *or contributed to*, by the acts. defaults or negligence of Union Camp. . . . Union Camp will further indemnify and save harmless [SCL] . . . from all loss, damage and expense growing in any manner out of such acts, defaults, or negligence of Union Camp . . . or in any manner growing out of defects in trackage owned and maintained by Union Camp.

(Pet. App. 26a, 27a) (emphasis added).

roads (one of which is SCL) in connection with railroad operations at a Union Camp plant near Savannah, Georgia. The contract appears in its entirety as Petitioner's Appendix C (Pet. App. 20a-29a).

In its Order and opinion of August 6, 1975 (Resp. App. 1a) the District Court held that SCL was entitled to judgment on its cross-claim for all expenses, including attorneys fees, incurred in defense of the main action. Upon motion of Union Camp, the Court reconsidered its conclusion but reaffirmed its finding

> . . . that the *all inclusive* language of the contract in this case "can leave no doubt that it was the intention of the parties" that SCL was to be indemnified by Union Camp in the situation presented here, where the joint negligence of Union Camp and SCL caused the damage and expense sought to be indemnified.

Order and opinion of September 10, 1975, (Resp. App. 7a) (emphasis in original) *quoting Robert & Company Associates* v. *Pinkerton & Laws Company,* 120 Ga. App. 29, 31, 169 S.E.2d 360 (1969).

Union Camp appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291. The Fifth Circuit examined the contractual language at issue in light of the circumstances of the parties and the overall purpose of the agreement. That court concluded that "the intent of the parties arising from the entirety of the contract is that Seaboard should be held harmless for its own negligence", 554 F.2d at 1303 (Pet. App. 15a-16a), affirming the District Court.

Union Camp filed a timely Petition for Rehearing *En Banc* based in part upon the decision of the Superior Court of Chatham County, Georgia, in *Sammons* v. *Union Camp* (Pet. App. D, 30a-34a) which held that the indemnification for road crossing accidents contained in paragraph 5 of the contract is not invoked when, as in *Sammons,* Union Camp was adjudged not to be negligent in any degree.

The Fifth Circuit denied Union Camp's Petition for Rehearing *En Banc.*

REASONS FOR DENIAL OF WRIT

The District Court (Resp. App. 1a-8a) and the unanimous Court of Appeals (Pet. App. 2a-18a) held that the indemnity provisions at issue satisfy the "plain, clear and unequivocal" standard required by Georgia law to provide indemnity for the negligence of the indemnitee. Union Camp's petition for rehearing *en banc* in which it advanced the arguments now presented to this Court was denied (Pet. App. 19a). These decisions are correct and further review by this Court is unnecessary.

1. The Decision Below Correctly Applies Georgia Law To The Contract Between The Parties.

As Union Camp acknowledges, "[t]he ultimate question in this case is whether the contract reflects that the contracting parties must have contemplated and specifically provided for indemnification of the indemnitee's own negligence." (Pet. pp. 11, 12). The District Court and the Fifth Circuit correctly applied Georgia law to this contract and answered the question in the affirmative.

The District Court examined the contract as a whole in light of the circumstances of the parties. The Court applied Georgia law with particular emphasis on the

statutory mandate that "[t]he cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." Ga. Code § 20-702 [Order and opinion of August 6, 1975 (Resp. App. 3a, 4a)]. The District Court concluded that SCL was entitled to contractual indemnity for its own negligence because "the intention is clear and no other rational meaning can be ascribed to the language used" (Resp. App. 4a). In ruling on Union Camp's motion for reconsideration, the Court reaffirmed its "holding that the language in the case at bar clearly and unequivocably expresses an intention to indemnify." Order and opinion of September 10, 1975 at 4 (Resp. App. 8a).

The Fifth Circuit decision enunciates the Georgia standard for determining whether an indemnitee will be held harmless for loss arising from its own negligence. An intent to so indemnify must be expressed in "plain, clear and unequivocal terms." No talismanic or "magic" words are required, however, and thus the determination must be made by close judicial examination of the particular contractual language at issue in light of the circumstances of the parties and the overall purpose of the agreement. 554 F.2d at 1302 (Pet. App. 10a, 11a).

The Circuit Court then applied the Georgia standard to the contractual language of this case, and concluded that the "plain, clear and unequivocal" standard to provide indemnity was met because of three factors. First, under paragraph 12, SCL is to be indemnified for losses arising out of "use . . . of the tracks". Because SCL was contractually permitted to use the tracks, indemnificatory coverage of that activity constituted "'a compelling indication that SCL is protected against its own negligence." The Court discussed *Louisville & Nashville R. R. Co.* v. *Atlantic Co.*, 66 Ga. App. 791, 19 S.E.2d 364 (1942), which is directly in point on this issue. 554 F.2d at 1303, (Pet. App. 13a-15a).

A second reason given by the Fifth Circuit for concluding that SCL was to be protected for its own negligence was the assumption by Union Camp of all "loss . . . contributed to . . . by the negligence of Union Camp"[3] and agreement to fully indemnify SCL under such circumstances. The Circuit Court held that the obligation of indemnity undertaken by Union Camp extended beyond its own negligence and encompassed the negligence of one "who was a tortfeasor in connection with Union Camp". 554 F.2d at 1303, (Pet. App. 15a).

The third factor in favor of indemnity coverage to SCL stressed by the Fifth Circuit was paragraph 5 which provides indemnity when a loss occurs by reason of a railroad crossing accident. That the railroad is a party likely to be found to be at fault in such an accident is a fact which the Fifth Circuit viewed as buttressing its conclusion that "the intention of the parties arising from the entirety of the contract is that Seaboard should be held harmless for its own negligence." 554 F.2d at 1303, 1304, (Pet. App. at 15a, 16a).

---

[3] Petitioner's comparison of language discussion of the *Louisville & Nashville* case fails to mention Petitioner's agreement to hold harmless and indemnify where its negligence "contributed to" a loss; indeed the key words "contributed to" in paragraph 12 of the agreement are nowhere mentioned in Union Camp's Petition.

2. The Decision Below Is Unaffected by *Sammons* v. *Union Camp*.

Petitioner Union Camp urges that there is a "conflict" between the opinion below and the decision of a State trial court having county-wide jurisdiction in *Sammons* v. *Union Camp* (reproduced as Pet. App. D, Pet. App. 30a-34a), presently on appeal to the Georgia Court of Appeals (Pet. p. 2), Docket Number 55036.

At issue in this proceeding and in *Sammons* are certain indemnity provisions of a spur track switching agreement governing rights and liabilities of Union Camp and several railroads (including SCL) in connection with railroad operations at Union Camp's Savannah plant. In this proceeding, as in *Sammons,* a road crossing accident is involved, thus invoking paragraph 5 of the agreement. The State trial court judge in *Sammons* concluded that paragraph 5 of the agreement did not indemnify the railroad where Union Camp had been adjudged not to be negligent. That federal courts are not bound by such a decision is the holding of this Court in *King* v. *United Commercial Travelers,* 333 U. S. 153 (1948), and is acknowledged by Union Camp at page 7 of its Petition.

However, even if *Sammons* were to be affirmed by a Georgia appellate court, the judgment and decision of the Fifth Circuit in these proceedings would be unaffected. In this case, Union Camp was adjudged to be negligent. Thus Union Camp must indemnify SCL not only under paragraph 5 but also under paragraph 12 of the contract. Regardless of the ultimate disposition of *Sammons,* Union Camp is still fully liable to SCL under paragraph 12.

As the Superior Court stated in *Sammons*:

> In the case now before the court there is no question of joint negligence between the Railroads and Union Camp as the jury divided the negligence between the Railroads and the Plaintiff and specifically excluded Union Camp.

(Pet. App. at).

Therefore, this Court should deny Union Camp's "unusual request" (Pet. p. 4, n. 2) that this Court grant certiorari on Union Camp's slim hope that there may be somewhat of a conflict sometime in the future. Any conflict will not be material to the decision in this case.

3. Georgia Law Does Not Require Reference To "Indemnitee's Negligence".

Although Union Camp lists a number of Georgia cases and cases decided under Georgia law in which indemnity was denied, no Georgia case stands for the proposition which Union Camp attempts to advance, to wit: That contractual language of indemnity must make "mention, explicitly or by necessary implication, of the indemnitee's negligence." (Pet. at p. 8). The Fifth Circuit, citing ample Georgia authority held this contention to be without merit. 554 F.2d at 1304 (Pet. App. A, pp. 16a-17a).

As was held in the cornerstone case of *Batson-Cook Company* v. *Georgia Marble Setting Company,* 112 Ga. App. 226, 144 S.E.2d 547 (1965):

> Although a number of Georgia cases in which the indemnity agreement has been construed to cover the indemnitee's negligence specifically used the term "negligence" in reference to the indemnitee,

> we do not find any Georgia cases which make the use of this or any other specific term a prerequisite to the indemnitee's recovery.

Id. at 232, 233. Unlike the law of some states, *see, e.g., Cole* v. *Chevron Chemical Company,* 447 F.2d 361, 368 (5th Cir. 1973) (La. Law), Georgia law requires no talismanic words to cover an indemnitee for his own negligence. *Georgia Ports Authority* v. *Central of Georgia Railway,* 135 Ga. App. 859, 862, 210 S.E.2d 467 (1975). Indeed, in *Robert and Company Associates* v. *Pinkerton and Laws Company,* 120 Ga. App. 29, 169 S.E.2d 360 (1969), the Georgia Court of Appeals noted that the term "negligence" was not included in the indemnification agreement, but that "[i]f the word negligence had been used, it might be open to question that it was limited to liability only for negligence." Id. at 32 (citations omitted).

4. The Grammatical Construction Offered By Union Camp Omits Material Terms of the Contract.

Union Camp argues that the construction of paragraph 12 accorded by the Court below is a "grammatical impossibility". At page 10 of its Petition, Union Camp sets forth what it describes as the "essential structure" of paragraph 12.

The language quoted by Union Camp does not reflect its undertaking to fully indemnify SCL whenever the acts, defaults or negligence of Union camp caused "*. . . or contributed to . . .*" injury, death, or property damage. The glaring omission of the words "or contributed to" renders irrelevant Union Camp's grammatical analysis of the contract. Thus in the actual language of the contract (as opposed to that quoted by Union Camp), Union Camp assumes all risk of damage

or injury occuring in the maintenance, use or operation of the tracks, etc. caused or contributed to by Union Camp. The jury found that Union Camp was contributorily negligent.

The import of the words "contributed to" is discussed in the Fifth Circuit opinion 554 F.2d at 1303 (Pet. App. 15a). Nowhere in its Petition does Union Camp discuss this contractual undertaking.

5. Recovery Over Against An Indemnitor Is Not At Issue.

At page 12 of its Petition, Union Camp states that under Georgia law, liability to another is required before an indemnitee may seek *recovery over* against an indemnitor.[4] However, that issue is not involved in these proceedings. SCL paid nothing to the Plaintiff Ray Brown and seeks to recover of Union Camp only its expenses incurred in the successful defense of Respondent Brown's claim. Under Georgia law, an indemnitee is entitled to recover costs of litigation and attorneys fees incurred in defending the main action. *U.S.A., Inc.* v. *Kirkland,* 142 Ga. App. 484, 233 S.E.2d 833 (May 9, 1977), *rehearing denied,* 142 Ga. App. 486, 233 S.E.2d 835 (June 1, 1977). No Georgia case holds that a successful defense defeats such recovery.

6. *United States* v. *Seckinger* Does Not Involve Georgia Law.

Reason "5" advanced by Union Camp at page 12 of its Petition is entitled "Said Interpretation Ignores

---

[4] As noted by the Fifth Circuit, in the area of contractual indemnity, Georgia law does not require a judgment fixing liability as a "prerequisite to recovery on the contract." 554 F.2d at 1304 (Pet. App. 16a, 17a), *citing Robert & Co. Assc.* v. *Pinkerton and Laws Co.,* 120 Ga. App. 29, 33, 169 S.E.2d 360 (1969) and *Rite Diet Feeds* v. *Central of Georgia Railway,* 136 Ga. App. 14, 16, 220 S.E.2d 22, 24 (1975).

the Georgia Comparative Negligence Rule in *U. S.* v. *Seckinger.*" The statement is without basis.

In *United States* v. *Seckinger,* 397 U.S. 203 (1970), this Court states at page 209 that its holding is one of federal law. Georgia law was not at issue. In *Southern Railway* v. *Brunswick Pulp & Paper Co.,* 386 F. Supp. 96 (S. D. Ga. 1974), then Chief Judge Lawrence made an *Eric* guess that a Georgia court would apply pure comparative negligence where, as in that case, contractual indemnity was limited to loss *caused by the indemnitee.* There was no "or contributed to" language in *Southern Railway.* No Georgia decision has adopted that holding. The contractual language in *Seckinger* is similarly limited. Neither *Seckinger* nor *Brunswick Paper* is even tangentially related to this case.

7. The Relevant Provisions Were Construed In Context.

A cursory reading of the opinion of the Fifth Circuit (Pet. App. 2a-12a) and the opinions of the District Court (Resp. App. 1a-8a) shows that there is no merit in Union Camp's assertion that paragraph 5 and paragraph 12 were not read in context. The District Court held:

> . . . the court is of the opinion that the entire language of the contract clearly expresses an intention that SCL be indemnified by Union Camp for expenses and attorneys fees . . .

(Resp. App. 5a). Similarly, the Fifth Circuit held: "The intent of the parties arising from the *entirety of the contract* is that Seaboard should be held harmless from its own negligence." 554 F.2d at 1303, 1304, (Pet. App. 16a) (emphasis added).

8. The Decision Below Does Not Require Or Justify Exercise By This Court Of Its Discretionary Powers of Review.

As noted by the Fifth Circuit:

> This case poses the recurring question whether an indemnity agreement which makes no explicit reference to the indemnitee's negligence can nonetheless suffice to relieve the indemnitee of losses occasioned by its negligence.

554 F.2d at 1302 (Pet. App. 9a).

The issue is whether the language of *this* contract, when read in light of the circumstances of *these* parties reflects a "plain, clear and unequivocal" intent to indemnify the indemnitee against its own negligence. Different language, different circumstances or a different standard will require a separate determination. This issue is uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. Indeed the Fifth Circuit noted that in indemnity cases "a court must closely examine the language of a contract in each case . . ." 554 F.2d at 1302, (Pet. App. 11a).

As previously discussed in this brief, only one State decision, *Sammons* v. *Union Camp,* has construed this contract. That trial court decision does not constitute controlling State law and even if affirmed would not create a conflict with the decision of the Fifth Circuit in this case which would require reversal of the instant case.

The attack waged by Union Camp on peripheral matters similarly falls short of the "special and important" considerations of this Court's Rule 19. Union Camp seeks to distinguish the most analogous State

decision [5] by a grammatical analysis of language which omits material terms of the actual contract. Union Camp cites "established Georgia law" with respect to recovery of payments to the injured party, an issue not present in this case. Finally, Union Camp cites the "Georgia Comparative Negligence Rule" which has not been adopted by any Georgia Court and which applies to language of indemnity quite different than that which is involved in this case.

In summary, Union Camp has not shown that the decision below involves an important State question or that it is in conflict with applicable State law or any other reason that this Court should grant review.

[5] *Louisville & Nashville R. R. Co.* v. *The Atlantic Company*, 66 Ga. App. 791, 19 S.E.2d 364 (1942) which is discussed by the Fifth Circuit. 554 F.2d at 1303 (Pet. App. 14a-15a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD C. YOUNG
MALCOLM R. MACLEAN
F. SAUNDERS ALDRIDGE, III
Post Office Box 9848
Savannah, Georgia 31402

Attorneys for Respondent Seaboard Coast Line Railroad Company

OF COUNSEL:

HUNTER, HOULIHAN, MACLEAN, EXLEY, DUNN & CONNERAT, P. C.
Post Office Box 9848
Savannah, Georgia 31402

JAMES E. WILLIAMS
500 Water Street
Jacksonville, Florida 32202

November, 1977

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION No. 474-183

RAY D. BROWN and NANCY BROWN, *Plaintiffs*

vs.

SEABOARD COAST LINE RAILROAD and UNION CAMP CORPORATION, *Defendants*

Order

In this negligence diversity action, Ray and Nancy Brown sued Seaboard Coast Line Railroad Company [SCL] and Union Camp Corporation [Union Camp] for damages resulting from a collision between Brown's tractor-trailer and an SCL locomotive at a private crossing owned and maintained by Union Camp.

SCL cross-claimed against Union Camp for any amount SCL might be required to pay the Browns in damages as well as for expenses of the litigation, including attorneys fees. Both defendants agreed that the cross-claim would be tried by the court without a jury following the submission of the main tort claim to the jury; but with the benefit of all relevant evidence introduced in the main case.

The jury, in response to special questions submitted to it under Rule 49(a), Fed. R. Civ. P., answered that Brown was 45% negligent, SCL 40% negligent, and Union Camp 15% negligent in jointly causing the collision. This resulted in a judgment discharging both defendants of any liability to the Browns because under the applicable Georgia law, a plaintiff may not recover against any defendant whose negligence is less than plaintiff's. *Mishoe* v. *Davis*, 64 Ga. App. 700 (1941).

SCL claims indemnity from Union Camp for all its expenses and attorneys fees incurred in defense of the main action. This claim is founded upon a contract between Union Camp and its "Plant Switching Railroads," one of which is SCL. That contract provides in pertinent part:

> "5. When deemed necessary by the Plant Switching Railroads, Union Camp will, at its expense, install, maintain and operate such road crossing protection as may be specified and considered necessary by the Plant Switching Railroads at any road crossing at grade over tracks of Union Camp; or, in lieu thereof, protect same with crossing watchman; Union Camp, at all times, to protect, hold harmless and indemnify the Plant Switching Railroad and S&A, collectively and individually, against any and all loss, cost, damage and expense accruing account of [sic] any road crossing at grade with tracks of Union Camp."
>
> • • •
>
> "12. In the construction, operation, use, repair, alteration or maintenance of the tracks, or any tracks adjacent thereto or connected therewith, covered by this agreement, or of the right of way, or any building, structure, equipment or work of any nature connected in any manner therewith, Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp, or any agent, employee or representative in its service or under its control, or by defects in trackage owned and maintained by Union Camp. Union Camp will further indemnify and save harmless the Plant Switching Railroads and S&A, or each of them, from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp, its agents, employees or representatives in its service

> or under its control, or in any manner growing out of defects in trackage owned and maintained by Union Camp."

There is no dispute that the tracks and crossing were involved in the collision and were owned and maintained by Union Camp. In addition, the Court finds from the evidence that Union Camp, in fact, exercised control of the crossing. At various times, it installed and removed traffic control signs governing the crossing and its approaches.

There is no dispute that Union Camp declined SCL's invitation to undertake SCL's defense of the main case.

There is no dispute that SCL incurred $1,605.37 expenses plus $4,950.00 attorneys fees in defense of its main case.

Following the verdict of the jury, Union Camp moved to dismiss the cross-claim upon the ground that "[u]nder Georgia law, a party may not seek indemnity over against another party until the party seeking indemnity is found liable to the injured party." Motion of Union Camp Corporation to Dismiss Cross-claim.

In substance, Union Camp's arguments in support of its disclaimer of liability come to this:

1. Neither the contract nor the law permits indemnity against losses resulting from one's own negligence.

2. The jury's verdict absolved Seaboard Coast Line from liability, thus eliminating the basis for any indemnity.

As a defense to SCL's claim for reimbursement of its attorneys fees, Union Camp asserts that the two contractual provisions involved do not provide indemnity for attorneys fees, *eo nomine,* and that the words, "loss," "cost," "damage," and "expense" do not mean or include "attorneys fees."

In construing a contract, be it one of indemnity or otherwise, "[t]he cardinal rule of construction is to ascertain

the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction." Ga. Code § 20-702. *Every other rule is subservient to this one. Bridges* v. *Home Guano Co.*, 33 Ga. App. 305, 309 (1924). (Emphasis supplied). "The fundamental rule, the rule which swallows up almost all others in construing a paper, is to give it that meaning which will best carry into effect the intent of the parties. This is the object of rules of interpretation, to discover the true intent of the parties, and in doing this we are to take the whole of [the instrument] together, and to consider this with the surrounding circumstances." *Shorter* v. *Methvin*, 52 Ga. 225 (1), 230.

The first question, then—can a party contract to indemnify itself from its own negligence—must be answered in the affirmative where, as here, the intention is clear and no other rational meaning can be ascribed to the language used. *Southern Railway Company* v. *Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974); *Batson-Cook Co.* v. *Georgia Marble Setting Co.*, 112 Ga. App. 226 (1965).

The language in this case as contained in paragraph 12 of the contract:

> ". . . Union Camp will further indemnify and save harmless [SCL] . . . from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp . . . or in any manner growing out of defects in trackage owned and maintained by Union Camp,"

is as all inclusive of indemnity as words can make it. *See L & N Railroad Co.* v. *Atlantic Co.*, 66 Ga. App. 791 (1942).

Next, Union Camp's contention that there is nothing to indemnify in the absence of the imposition of liability, is similarly without merit. Paragraph 5 of the contract provides, in part: ". . . Union Camp, at all times, to protect,

hold harmless and indemnify . . . [SCL] . . . against any and all loss, cost, damage and expense accruing account of [sic] any road crossing at grade with tracks of Union Camp."

The collision in question, the resulting lawsuit and the expense incident to its defense unquestionably constitute "loss, cost, damage and expense accruing account of any road crossing at grade with the tracks of Union Camp." Whether or not the Browns prevailed in their suit is immaterial. *See B & B Electric Co.* v. *G. E. Bass & Co.*, 252 F.2d 698 (1958), *cert. denied* 357 U.S. 931, *and see Robert and Co. Associates* v. *Pinkerton & Laws Company*, 120 Ga. App. 29, 33 (1969); *Miller & Co.* v. *Louisville & Nashville Railroad Co.*, 328 F.2d 73, 78 (5th Cir. 1960); *A.C. Israel Commodity Co.* v. *American-W. African Lines Co.*, 397 F.2d 170 (3d Cir. 1968).

Union Camp's remaining contention that the term "expense" does not include attorneys fees is gainsaid by a definition of the term as contained in paragraph 9 of the contract where it is defined as "including attorneys fees." *Cf. B & B Electric Co.* v. *G. E. Bass & Co., supra.* Nothing to the contrary appears anywhere in the contract. Moreover, the Court is of the opinion that the entire language of the contract clearly expresses an intention that SCL be indemnified by Union Camp for expenses and attorneys fees such as have been incurred by SCL in this case.

Accordingly, it must follow that SCL is entitled to recover these amounts. The Clerk is directed to enter judgment for SCL in the amount of Six Thousand Five Hundred Fifty-five Dollars and Thirty-seven Cents ($6,555.37).

So Ordered, this 6th day of August, 1975.

/s/ ANTHONY A. ALAIMO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

(Caption Omitted in Printing)

Order on Motion for Reconsideration of the Order of August 6, 1975

Union Camp Corporation has moved the Court for a rehearing and reconsideration of the Court's Order entered August 6th, in substance finding in favor of Seaboard Coast Line Railroad Company [SCL] on its claim for indemnity.

Union Camp takes issue with the Court's construction of the language involved in this case, contending that it is in the face of the Georgia rule of construction in indemnity contracts. Next, in oral argument, Union Camp contends that the case of *Southern Railway Company* v. *Brunswick Pulp and Paper Co.*, 376 F. Supp. 96 (1974), stands for a contrary result than that reached by the Court in this case.

In *Robert & Company Associates* v. *Pinkerton & Laws Co.*, 120 Ga. App. 29, 31 (1969), the court held:

> " 'The cardinal rule of construction is to ascertain the intention of the parties. If that intention be clear, and it contravenes no rule of law, and sufficient words be used to arrive at the intention, it shall be enforced, irrespective of all technical or arbitrary rules of construction.' *Code* § 20-702.
>
> "Under the all-inclusive language of the agreement Pinkerton [Union Camp] not only agreed to '*be responsible from the time of signing the contract, or from the time of the beginning of the first work, whichever shall be earlier, for all injury or damage of any kind resulting from this work, to persons or property*' but also agreed specifically to '*exonerate, indemnify and save harmless the county and Robert & Company Associates* [SCL] . . . (Italics in original). *We think the language of this agreement can leave no doubt that it was the intention of the parties that Pinkerton [Union Camp] should indemnify Robert & Company Associates [SCL]* irrespective of whether any claim arose by reason of the negligence of Robert & Company Associates [SCL], or for other reasons." (Emphasis supplied).

In the case at bar, the following language appears from paragraph five of the contract:

> ". . .; Union Camp, at all times, to protect, hold harmless and indemnify [SCL] against any and all loss, cost, damage and expense accruing out of any road crossing at grade with the tracks of Union Camp."

And in paragraph twelve of the contract, ". . . Union Camp hereby assumes all risk of, and liability for, loss or damage to any property or injury or death to any person, caused directly or indirectly, or contributed to, by the acts, defaults, or negligence of Union Camp . . . Union Camp will further indemnify and save harmless [SCL] from all loss, damage and expense growing in any manner out of such acts, defaults or negligence of Union Camp . . . ." There is no dispute that Union Camp was found to be fifteen percent (15%) negligent in the main case.

This Court finds, as did the Court of Appeals of Georgia, with respect to the contract in *Robert & Company Associates, supra,* that the *all-inclusive* language of the contract in this case "can leave no doubt that it was the intention of the parties" that SCL was to be indemnified by Union Camp in the situation presented here, where the joint negligence of Union Camp and SCL caused the damage and expense sought to be indemnified.

Turning to the case of *Southern Railway Company* v. *Brunswick Pulp & Paper Company,* 376 F. Supp. 96, 100 (1974), the agreement construed in that case provided that

the Railroad was entitled to be indemnified for all damage resulting from the negligence of Brunswick Pulp. That language is much more restrictive than the language in the case at bar. Chief Judge Lawrence quoted from 41 Am. Jur. 2d, *Indemnity* § 15:

> "[A] contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it." 376 F. Supp. 100.

That is consistent with this Court's holding that the language in the case at bar clearly and unequivocally expresses an intention to indemnify.

In a brief just received by the Court, SCL has called attention to a recent decision of the Court of Appeals of Georgia, *Georgia Ports Authority* v. *Georgia Railway Co.*, No. 50709, Court of Appeals of Georgia, decided September 3, 1975. An examination of that opinion reveals that the facts of that case are singularly and strikingly similar to the facts of the case at bar, including status of the parties as well as the contractual language of indemnity. An additional similarity in that in both cases, the railroad undertook the switching operation on private property purely as a private undertaking, and not as one pursuant to its obligation as a common carrier. It is this Court's opinion that the holding in *Georgia Ports Authority* must be construed to be controlling in the case at bar.

Accordingly, the Court adheres to the ruling contained in its Order of August 6, 1975.

So Ordered, this 10th day of September, 1975.

/s/ ANTHONY A. ALAIMO
United States District Judge